

**STATE BOARD OF EQUALIZATION
LEGAL DIVISION (MIC:82)**

450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828
FAX 323-3387

MEMBER
First District

BRAD SHERMAN
Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
Third District, San Diego

MATTHEW K. FONG
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

November 7, 1994

BURTON W. OLIVER
Executive Director

Mr. P--- A. L---
L--- B---, Inc.
XXXXX --- Street
--- ---, CA XXXXX

RE: SR -- XX-XXXXXX
Rental of Medical Gas and Gas
Cylinders

Dear Mr. L---:

As we discussed in our telephone conversation on October 7, 1994, I am responding to your letter to the State Board of Equalization dated September 21, 1994. You indicated then that you were currently under audit but that the auditor had suggested that you write the Legal Division if you had any questions about the law.

During our conversation you indicated that you sell oxygen and nitrous oxide gas and rent gas cylinders to dental offices. You rent about 5000 cylinders to a supply house ex tax for re-rental and have received resale certificates on those rentals. You further indicated that you bought about 3000 bottles tax paid in 1989. The remainder of your inventory, about 2000 bottles, was purchased prior to 1989. You are being audited for the period July 1, 1991-June 30, 1994 and have filed returns regularly.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market

St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 PO.2d 201.] "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Prescription Medicines.

Section 6369, interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591, provides that sales of medicine, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. (Reg. 1591(a).) Subdivision(b)(1) defines "medicine" to "mean and include any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for such use." However, Regulation 1591(c)(2) adds that "medicines" do not include "articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As a rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

Regulation 1591(m) provides that tax does not apply to the sale, lease, or rental of medical oxygen delivery systems when sold or leased to an individual for his own use upon direction of a physician. We have previously determined that an oxygen storage tank is included in the definition of a "medicial oxygen delivery system." (Annot. 425.0690. Sales and Use Tax Annotations are excepts from previous Board Staff opinion letters and serve as a guide to Staff positions.)

C. Collection of Use Tax on Rental Payments Generally

The lease (or rental) of tangible personal property in California is a continuing sale unless that property is leased in substantially the same form as acquired by the lessor and the lessor has paid sales tax reimbursement or use tax measured by the purchase price of the property. (Rev. & Tax. Code §§ 6006(g)(5), 6006.1; Reg. 1660.) If the lease is a continuing sale under this definition, that lease is subject to use tax measured by rentals payable unless it is specifically exempted by statute. (Reg. 1660(c)(1).)

C. Tax Consequences.

The sale of the oxygen and nitrous oxide must be analysed differently from the rental of the cylinders. We have previously determined that oxygen and other medical gases sold to hospitals, licensed physicians, dentists, and podiatrists qualify as medicines under the above definition. As a result, such sales are exempt from tax. (Annot. 425.0620. Sales and Use Tax Annotations are excepts from previous Board Staff opinion letters and serve as a guide to Staff positions.)

Oxygen cylinders are, however, excluded from the definition of "medicines" under Regulation 1591(c)(2). Therefore, sales and rentals of such cylinders are subject to tax unless a statutory exemption or exclusion applies. You indicate that you rent about half of your cylinders ex tax for resale to a medical supply house and have received resale certificates. Assuming those certificates were issued timely and otherwise comply with Regulation 1668, those rentals are excluded from tax. You also indicate that you purchased about 3000 cylinders tax paid in 1989. Under the above authority, your rental of those cylinders is not subject to tax.

As noted above, sales of medical oxygen delivery systems are exempt only when they are sold to an individual for his own use at the direction of a licensed physician. The exemption does not extend to sales to hospitals and doctors for use on their premises. The words "dental office" cannot be substituted for "patient" in Regulation 1591(m). Words in a regulation are given their plain meaning unless the context shows that a technical meaning applies. The statute which that sub-division interprets and implements, Section 6369.5, plainly says that, for the exemption to apply, the system must be sold, leased, or rented "to an individual for the personal use of that individual." Such personal use does not include use by the dentist at his office.

You asked about the taxation of rentals of cylinders and gasses to veterinarians. Licensed veterinarians are consumers of drugs and medicines used or furnished by them in the performance of their professional duties. (§ 6018.1.) Sales of drugs and medicines to veterinarians are thus subject to tax but their subsequent sales to their clients are not. While medical gasses are considered "medicines" under this statute, the gas cylinders are not and so are covered by the rules discussed above. There is thus no tax on the rental of cylinders that you purchased tax-paid, but there is tax on the rental of cylinders which you purchased ex tax. The sale of the medical gasses would also be subject to tax.

I realize the above discussion has gone on a little long, but there are several different principles involved here. I hope it has answered your question. If you need anything more, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:te

cc: District Administrator (AC) - Van Nuys